as to how long it might continue and under what circumstances was tried before Judge Pardee at circuit and was retried before him on appeal. No amount of argument or elaboration could make this proposition plainer than will appear from a review of the record and the opinion. (See the various orders made by Judge Pardee at circuit, R., pp. 3, 5, 7, 18, and 23.)

For further discussion of this question we refer to our brief filed in this cause in support of our petition for certiorari.

II.

The application was based upon the further ground, as stated above, that the circuit court of appeals erred in deciding the case, has invaded the province of the trial court and master in deciding questions of fact, has set aside the report of the master and the decree of the circuit court approving same on questions of fact only, and has ignored and set aside the well-established rule of this court that "the master's conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part," and we now urge this ground for reversing the decree of the circuit court of appeals and affirming that of the circuit court. The court of appeals reached the conclusion that the report of Master Lathrop and the decree of the court confirming it are erroneous, set aside both, and remanded the case to the lower court with directions to overrule and discharge the motions attacking the receiver's accounts.

It appearing that upon a re-reference of the receiver's accounts, and our exceptions thereto, to Master Lathrop he found the facts in favor of these petitioners, it remains to be determined whether, under the well-recognized rules of this court, the circuit court of appeals were justified in substituting its judgment and estimation of the testimony for

that of Master Lathrop, and of the circuit court confirming his report.

The rule referred to, showing the weight given a master's findings of fact, is clearly stated in the case of Camden *vs.* Stuart, 144 U. S., 104, in this language:

"His conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there appears to have been error or mistake on his part."

Judge Pardee, in passing upon a master's report in the case of Missouri Pacific Railway Co. *vs.* Texas & Pacific Railway Co., 33 Fed. Rep., at page 806, says:

"The law of the case, as reported by the master, is not questioned. The evidence is so conflicting that in order to reach a finding of the real facts some testimony must be rejected as untruthful. In such a case, *unless plain error is established, the finding of a master should be as conclusive as a verdict of a jury.*"

In 14 Am. & Eng. Ency. of Law, at page 940, it is said:

"As a rule, however, it may be stated that *the findings of fact by the master are conclusive unless clear mistake or fraud is shown.*"

The author cites in support of his statement of the law numerous decisions, some from this court, and many from State courts of last resort. This proposition is so elementary and appears to be so well settled in this court a further citation of authorities would, we think, be altogether unnecessary, but we quote below what the courts are holding on this question from a few cases, and we find none to the contrary:

"Findings of fact by a master in chancery, to whom, by consent of parties, a case is referred to find the facts, are conclusive in the absence of anything to show that they are unsupported by the evidence" (Davis *vs.* Schwartz, 15 S. Ct., 237; 155 U. S., 631).

"Conclusions of fact of a master and trial court, on con-

flicting evidence in an equity case will not be disturbed on appeal, unless some obvious error is pointed out" (Warren *vs.* Keep, 15 S. Ct., 83; 155 U. S., 265).

"The findings of a master on matters of facts are *prima facie* correct, and should not be overruled in an appellate court unless without evidence to sustain them" (Gay Mfg. Co. *vs.* Camp, 65 Fed. Rep., 794).

"A referee's finding, like that of a jury, will not be disturbed if fairly warranted by the evidence" (McClure *vs.* Times Pub. Co. (Pa. Sup.), 32 A., 293).

"A referee's findings of fact are not reviewable on appeal" (McEwen *vs.* Louchiem (N. C.), 20 S. E., 519).

"A finding of a referee will not be disturbed, though the court might have reached a different conclusion, where it cannot be said with reasonable certainty that the finding was erroneous" (D. G. Burton Co. *vs.* Cowan (Sup.), 30 N. Y. Sup., 317).

"The findings of a referee on conflicting evidence will not be disturbed on appeal" (Douglas *vs.* Halstead, 30 N. Y. S., 592).

"The findings of a trial court will not be disturbed unless they are contrary to the clear preponderance of the evidence" (Senour Mfg. Co. *vs.* Clarke (Wis.), 71 N. W., 883).

"Where a decree is based on conflicting evidence, the finding of a chancellor will not be disturbed" (Chrislip *vs.* Teter (W. Va.), 71 N. W., 98).

"Where the appellate court cannot say that the findings of the trial court are clearly against the preponderance of the evidence, the judgment will be affirmed" (Clausen *vs.* Hale (Wis.), 71 N. W., 122).

"Where a report of a referee was confirmed by the court, the judgment will not be reversed on questions of fact, unless clearly against the weight of the evidence" (McCallan *vs.* Buckstaff (Wis.), 71 N. W., 604).

"A finding of fact on conflicting evidence will not be disturbed on appeal" (Requa *vs.* Irwin (Sup.), 44 N. Y. S., 771).

"A finding of fact by a trial court will not be set aside unless against the clear preponderance of the evidence" (Henderson *vs.* Adams (Utah), 48, p. 398).

"Conclusions of the referee on questions of fact, confirmed by the court, are in the nature of special findings, and, if supported by the evidence, will not be reviewed" (Demsey *vs.* Schawacker (Mo. Sup.), 38 S. W., 954).

"The findings of an auditor or master, confirmed by the lower court, are to be taken as presumably correct, and will be reversed only in case of obvious error" (Richardson *vs.* Van Auen, 5 App. D. C., 209).

"The supreme court cannot review conflicting evidence" (Koons *vs.* Beach (Ind. Sup.), 45 N. E., 601).

"A finding by a circuit court on conflicting evidence as to the proper compensation of a trustee, not being flagrantly against testimony, will not be disturbed" (Chenault *vs.* Madison County Court (Ky.), 38 S. W., 432).

"A master's finding of fact, on evidence sufficient to go to a jury, will not be disturbed on appeal" (White *vs.* Wright (Pa. Sup.), 36 A., 154).

"Findings of a court of equity, or by a referee, on conflicting evidence will not be disturbed, unless manifestly against the weight of evidence" (Swyer *vs.* Salt Lake City Copper Mfg. Co. (Utah), 48, p. 311).

"A referee's findings of fact will not be disturbed unless against the clear preponderance of the evidence" (Hinz *vs.* Van Dusen (Wis.), 70 N. W., 657).

"Findings of a referee, especially when approved by the court below, having evidence to sustain them, will not be disturbed" (Philadelphia Co. *vs.* United Gas Imp. Co. (Pa.), Sup. 36 A., 742).

"Where the master and the chancellor agreed with respect to disputed items in an account, and there is legal evidence to sustain them, they will not be reviewed" (Still *vs.* Burkett (Tenn.), Ch. Ap., 39 S. W., 347).

"A finding by a master on conflicting evidence, approved by the court, will not be disturbed unless clearly wrong" (Hall Co. *vs.* Dresser (Mass.), 46 N. E., 420).

"The finding of a master that the rail of a railway track was so worn as to render its use negligence, made on conflicting testimony, and an examination of the rail by him in person, with counsel, will not be reviewed" (Clyde *vs.* Richmond D. R. Co. (C. C.), 59 Fed. Rep., 394).

"Findings of fact by a referee on conflicting evidence, confirmed by the court, will not be disturbed on appeal" (Hannaman *vs.* Karrick, 33 P., 1039).

"A referee's finding on conflicting evidence, involving the credibility of witnesses, stands on the same footing as a verdict" (Briggs *vs.* Hiles (Wis.), 58 N. W., 752).

"Findings of a referee will not be disturbed on appeal un-

less against the manifest preponderance of evidence" (Schute *vs.* Jones, 28 N. Y. S., 1072).

"A decree of a chancellor on conflicting evidence will not be set aside where there was any evidence to sustain it" (Vaughan *vs.* Commercial National Bank (Miss.), 18 So., 270).

"Findings of fact in equity will not be reversed unless they are against the weight of evidence" (So. Com. & Savings Bank *vs.* Koeln, 60 Mo. App., 79).

"Where there is legitimate evidence fairly tending to establish a fact, the findings thereon by a special master will not be disturbed unless fraud or corruption is shown" (Walston *vs.* Smith, 32 A., 486).

Bearing in mind the above rule, we turn to the findings of fact reported by Master Lathrop and upon which the decree of the circuit court is based, and to the testimony, so that this court may determine whether there is evidence to support such findings.

The substantial foundation for the decree of the circuit court that Dillingham should return the money taken between April, 1893, and April, 1895, a period of two years, at $1,800 per year, or a total of $3,600, is the master's finding of fact as follows:

"I consider from the testimony, (1) that the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4, 1886, allowing him $150 per month, and was intended as full compensation for the services up to the time the receivership terminated; (2) since turning over the rolls, etc., to the purchasing trustees the duties and labors of the receiver, as appears from the evidence, have not been arduous; (3) and such services were contemplated when the fee of $20,000 was paid in. All the other parties to whom allowances were made so considered it, as they made no further charge, except Special Master Winter, who was by special agreement allowed a further small compensation. I do not consider that I have a right to go behind the receiver's reports, which were reported on by the master and not objected to, as above stated. Therefore, the said receiver, by receiving $150 per

month, from September, 1891, to April, 1893, has been much more than compensated for any labor he has performed as such receiver from September, 1891, up to the present time" (R., p. 146).

The first of the above findings by the master is: "That the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4th, 1886, allowing him $150, and was intended as full compensation for the services up to the time the receivership terminated." This finding is clearly supported by the testimony. Indeed, there is practically no evidence to the contrary, as will appear from the following summary of the evidence heard on this point by Master Lathrop:

The final decree of foreclosure provides:

"Second. Upon confirmation of the sale and delivery of title, the purchaser shall pay in cash such sums as may be ascertained, on due reference to and report by the master, sufficient to pay off and satisfy all the indebtedness of the receivers, incurred by them in this cause, including all the expenses and costs of the receivers' administration of the property, all claims and demands adjudged against them growing out of their operation of the property, all receivers' certificates heretofore ordered to be issued and remaining unpaid, all indebtedness for pay-rolls, materials and supplies due by said receivers, *and also the compensation of the receivers, and their solicitors*" (R., p. 15).

Soon after the sale and confirmation and pursuant to the above-quoted provisions of the decree of foreclosure, on June 8, 1891, the receiver Dillingham and his attorneys and other parties having claims filed their petitions for allowances with Master Winter. Some of these petitions are in the record (R., pp. 88 to 90). We quote Mr. Dillingham's petition (italics ours):

"*Petition of Receiver Dillingham for Compensation.*

"UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

"MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY, *Complainant,*
versus
"TEXAS CENTRAL RAILWAY COMPANY, *Defendant.*
} No. 21. Equity.

"Now before John G. Winter, special master in the above-entitled cause, comes Charles Dillingham, receiver in the above-entitled cause, and prays that said special master will *make to him such an allowance for his services as receiver in the above-entitled cause, from the date of his appointment until his discharge,* as to said master may seem just and proper, and appearer prays for all further and equitable relief.

"FARRAR & KRUTTSCHNITT,
"*Solicitors for Chas. Dillingham.*"

R., p. 6.

Please bear in mind that the petition is for compensation "until his discharge"—in other words, for final compensation.

The claims presented by the petitions for allowances created a spirited controversy, which required the taking of considerable testimony and several hearings before the master, the time covering a period of several months before the controversy thus engendered was finally compromised. In the meantime a large amount of correspondence took place between the local attorney of the trustee and the attorneys representing the purchasing trustees in New York, and a few telegrams passed between Master Winter and the New York counsel. At the several hearings before Master Winter, stenographic reports of the testimony were taken and filed with his report upon said petitions. These peti-

tions and the correspondence between the attorneys in Texas and those in New York in reference to these claims were introduced in evidence before Master Lathrop. In addition, we introduced in evidence the testimony of Henry K. McHarg, one of the purchasing trustees, and the receipt of Charles Dillingham, besides taking the oral testimony of a number of other witnesses, including Charles Dillingham, all of which appears in the record.

The report of Master Winter upon said petitions for allowances shows that it is made under the provisions of the final decree quoted above. The master states: "At the hearing, claims for compensation and allowance were presented as follows." Then he sets out the claims of several parties, including the claim of Charles Dillingham, receiver, and on page 160 he says:

"After several adjournments the report again came up for consideration in my office, in Houston, Texas, on the 24th day of August, 1891, when appeared the aforementioned counsel, Messrs. Baker, Kruttschnitt and Ballinger, *whereupon counsel named stated in open court that the claims for compensation by the receivers, Clark and Dillingham*, and the Farmers' Loan & Trust Company, trustee, by Messrs. Baker, Botts & Baker, Farrar & Kruttschnitt, Turner, McClure & Rolston, Ballinger, Mott & Terry, Ballinger, Mott & Ballinger and Willie, Mott & Ballinger *had been adjusted with the purchasing committee hereinbefore mentioned.* I therefore make no report upon these items."

The foregoing finding shows that the claims for allowances as set out in the petitions filed with the master, including Dillingham's, had been compromised with these petitioners. We introduced in evidence before Special Master Lathrop Dillingham's receipt for $20,000, which reads as follows:

"CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS.

"MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY
vs.
"TEXAS CENTRAL RAILWAY COMPANY ET AL. } Original Bill.

"THE FARMERS' LOAN AND TRUST COMPANY
vs.
"TEXAS CENTRAL RAILWAY COMPANY ET AL. } Cross bill.

"Received of Messrs. Moran, Gold, and McHarg, purchasing committee, the sum of twenty thousand dollars ($20,000.00) *in full of my fees and charges as receiver of the Texas Central Railway Company*, as per agreement.

"Dated Houston, Texas, Sept. 14th, 1891.

"(Duplicate.) CHARLES DILLINGHAM, *Receiver.*"

R., p. 81.

This receipt was offered in connection with the deposition of one of the petitioners, Henry K. McHarg, who testified, among other things, as follows:

"Second interrogatory. This is a proceeding on behalf of the purchasing committee, who object to certain items of $150.00 each, charged in the accounts of Charles Dillingham, as receiver, covering a period from September, 1891, to April, 1895, aggregating between six and seven thousand dollars. The committee claiming that they paid Mr. Dillingham $20,000.00, on or about September 14th, 1891, in full of his services as receiver until his discharge. Now, you will please state if you remember the circumstances under which said $20,000.00 was paid, and how it was paid, and your understanding as to what such payment covered."

"Answer. I recollect the fact of our company having paid $20,000.00 in full for Mr. Dillingham's services, and supposed at the time that it covered them entirely."

"Third interrogatory. You will please state if you had any attorney, or attorneys, looking after the claim of said Dillingham and others. If so, please state who acted as

your attorney, or the attorney for the committee, and state who had control of such matters, you or your attorney, and who, if any one, negotiated said settlement. State all these matters as fully as you can."

"A. Messrs. Turner, McClure & Roiston were attorneys for the trust company and for the committee. They had full control of all matters connected with the litigation, and negotiated the settlement."

"Fourth interrogatory. State whether or not you had ever at any time, either prior or subsequent to the payment of said $20,000.00, had any agreement or understanding with Mr. Dillingham as to his right to receive any additional compensation over and above said $20,000.00. Please state fully."

"A. The committee or myself never had any agreement or understanding with Mr. Dillingham as to his right to receive any sum in compensation for his services in excess of the $20,000.00."

"Fifth interrogatory. State whether or not you or the committee ever authorized or empowered any person to agree to give Mr. Dillingham any additional compensation for his services. Please state fully."

"Answer. Neither the committee nor myself ever authorized or empowered any person to agree to give Mr. Dillingham any additional compensation for his services."

"Sixth interrogatory. Please state the names of the persons who constituted the purchasing committee to purchase the Texas Central Railway Company. State whether or not such persons are bondholders secured by the first mortgage on the Texas Central Railway Company, which mortgage was foreclosed.

"Answer. The purchasing committee to purchase the Texas Central Railway Company consisted of Messrs. Charles Moran, Cornelius B. Gould, and myself. They either represented large holders of the first-mortgage bonds or were themselves *bona fide* holders.

"Seventh interrogatory. Please state what your understanding was, and from whom you derived your information, as to what the $20,000 was paid Mr. Dillingham for—that is, what services was he to perform. Please state this fully.

"Answer. My understanding was that the $20,000, which seemed to me an extravagant amount at the time, was paid

Mr. Dillingham in full for his services. Could not state from whom I derived my information; presume it came from our attorneys" (R., pp. 38 to 71).

We also introduced in evidence the testimony of the former master, Jno. G. Winter, who, among other things, testified as follows:

"Question. Do you remember whether you made a report on these claims or not?

"Answer. The report in this case will show.

"Question. Look and see if that is your report. You made that report, did you not?

"Answer. Yes, sir. Report in master's No. 321, filed August 25, 1891, was made by me and signed by me, and I recollect the circumstances.

"Question. Is that report on the compensation of the receivers and the attorneys?

"Answer. Yes, sir; the report speaks for itself. It appears to be as you say. It speaks for itself, however.

"Question. 'After several adjournments the report again came up for consideration in my office, at Houston, Texas, on the 24th day of August, 1891, when appeared the aforementioned counsel, Messrs. Botts, Kruttschnitt and Ballinger; whereupon the counsel named stated in open court that the claims for compensation by the receivers, Clarke and Dillingham, and by the Farmers' Loan and Trust Company, trustee, by Messrs. Baker, Botts & Baker; Farrar & Kruttschnitt, Turner, McClure & Rolston, Ballinger, Mott & Terry, Mott, Terry & Ballinger, Willie, Mott & Ballinger, and Mott and Ballinger, had been adjusted with the purchasing committee hereinbefore mentioned. I therefore make no report upon these items.' Now I wish you to explain what was stated before you by counsel—what claims had been adjusted.

"Answer. I could not state what transpired there more fully than what you have just read. There was quite a gathering in my office at the time. This is all that was stated. When the reference was called that statement was made by some one of the gentlemen, but I do not know who.

"Question. Do you know if the claims set forth in the petitions upon which that report is made, the petitions filed

by the parties respectively in master's No. 321, are the ones you have examined?

"Answer. I suppose so. The report will show" (R., pp. 64 to 67).

Mr. DILLINGHAM testified in his own behalf before Master Lathrop as follows:

"Q. You received in September, 1891, from these same people that are objecting here $20,000.00, didn't you, as compensation as receiver?

"A. I received from the Farmers' Loan and Trust Company, I think.

"Q. No, it is the purchasing trustees.

"A. The question of compensation came up, and the compensation of the receivers and the lawyers and master came up, and it was referred to a special master, and before the hearing the Farmers' Loan and Trust Company, I suppose it was—it was through their attorneys—came in and made a proposition to us all to pay us a lump sum, which was accepted and mine was $20,000.00" (R., p. 40).

On further examination respondent testified:

"Q. I will ask you to explain fully the matters and circumstances and details under which this sum of $20,000.00 was paid you by the Farmers' Loan and Trust Company for these parties here.

"A. The litigation was about to be closed and the mortgaged property had been sold, and the question of compensation to the receiver and the attorneys in the case come up, and the court ordered it referred to the master for report. The master had ordered a hearing or called for a hearing, but at that hearing the attorneys got together and it was suggested that it might be fixed out of court, and there was negotiations between Baker, Botts & Baker on the one side, and——

"Q. Baker, Botts & Baker represented whom?

"A. Themselves and me. And Mott & Ballinger, Ballinger, Mott & Terry, Mott & Terry, Mott's firm who had been engaged in the litigation, and Farrar, Jones & Kruttschnitt, and finally they arrived at a—the Farmers' Loan and Trust Company, to pay us all a lump sum.

"Q. Each?

"A. Each, and that proposition was accepted and they paid it.

"Q. What was that $20,000.00 intended as compensation for by the parties who paid it, and by you who accepted it?

"A. It was intended as compensation as receiver up to that time.

"Q. Up to that time?

"A. Yes, sir.

"Q. Was anything said at that time as to further pay for the receiver?

"A. No, sir.

"Q. What time was this $20,000.00 paid in 1891?

"A. I cannot tell. I understand Mr. Campbell has a report there that shows it.

"(By Mr. CAMPBELL:) It shows September 24th, 1891.

"A. Yes, sir" (R., p. 43).

He also testified further:

"Q. Was there any understanding or agreement or stipulation when the $20,000.00 was paid as to how it was to be treated; if it was to be in full for all services rendered and to be rendered in the future?

"A. No stipulation that it was for services to be rendered.

"Q. It did not cover services to be rendered?

"A. No, sir.

"Q. Is it not a fact that the understanding was to the contrary; that you were to be compensated for matters with reference to the receivership thereafter, and that you were to continue to draw the $150.00 per month until the receivership was closed finally?

"A. I do not know that the question was discussed. I think at that time it was supposed the thing would be closed up at once" (R., pp. 43 to 46).

The correspondence between Col. M. F. Mott, local counsel of the Farmers' Loan and Trust Company, and Messrs. Turner, McClure & Rolston, New York counsel, was attached to the depositions of Mr. McHarg, and among other things appear the following facts:

Special Master Winter having had the matter of compensation of the various parties under consideration, on July

22, 1891, had concluded a draft of his report and wired to Messrs. Turner, McClure & Rolston, as follows:

"JULY 22ND, 1891.

"Dated Iredell, Texas.

"To Turner, McClure & Rolston, 22 Williams street, New York:

"Draft report too late to send your copy. Draft comes up for consideration Houston, Texas, Saturday; Mott notified; wire me Houston if desired. Your claim allows Mott fifteen, Metropolitan two, Botts Farrar twenty-five hundred extra, Clark three, Dillingham thirty, all thousand.

"JOHN G. WINTER."

R., pp. 73–'4.

On July 25, M. F. Mott, representing the Farmers' Loan and Trust Company in Texas, wrote to Turner, McClure & Rolston as follows:

"After full confidence with parties here, we find a settlement as matter of compromise can be made upon following terms, to wit: Dillingham, receiver, $20,000.00 in addition to what he has received; Farrar & Kruttschnitt, including compensation as counsel for Morgan's Company, five thousand in addition to what they have received; Baker, B. & B., ten thousand additional. All of Mott's firms, seventy-five hundred. These offers of compromise are predicated upon immediate acceptance and payment; if not accepted, Dillingham, Clarke, and Farrar & K. will file exceptions that allowances to them are inadequate, and other parties will claim full amounts allowed by master. We advise acceptance of offer. Think they are the best you can get. See Clarke in person. Of course offers are made as a compromise and without prejudice.

"M. F. MOTT."

R., p. 74.

On July 27 M. F. Mott wrote to Messrs. Turner, McClure & Rolston again as follows:

"To McClure & Rolston, 22 Williams street, New York:

"Winter writes me that he will change his report so as to allow Dillingham five thousand per annum, less amounts

received; B., B. & B. three thousand per annum. This increases somewhat their allowances, but does not affect compromise offers. Wait for my letter of yesterday.

M. F. MOTT."

R., p. 74.

In a letter from M. F. Mott to H. B. Turner, of July 26, 1891, in reference to what Dillingham claimed, he uses this language:

"First. As to Dillingham, he was disappointed in the amount of the award, and insisted that it should not be less than $30,000.00 in addition to the amounts already received. He was present with his attorney, who had prepared objections to the draft of the report on several grounds, and was ready to present and argue the same. The proposed report gave him in the neighborhood of twenty thousand dollars additional, with which he was not satisfied, and he claims ten or twelve thousand in addition to the allowance. I think that you and I know pretty well that he would get all he claims at the end of a litigation. It was with much difficulty he could be induced to make the offer. He seemed entirely confident and regards a ten-thousand-dollar abatement in his claim as a great concession. I think he was in serious earnest" (R., p. 76).

On July 24, 1891, Herbert B. Turner, of the firm of Turner, McClure & Rolston, wrote to Charles Moran, Esq., chairman of the purchasing trustees, a letter, in which he says:

"My correspondent telegraphs me that he has had a full conference with the parties at Houston, and was authorized to submit the following figures for a settlement as a matter of compromise: Dillingham, receiver, twenty thousand dollars. * * * These offers, he says, are predicated upon immediate acceptance and payment, and are the results of a long conference. It is necessary to know what will be done by the committee, because the parties in interest desire to file exceptions against the referee's report if an arrangement cannot be made; Dillingham, Clarke and Farrar & Kruttschnitt will file such exceptions on the ground that the allowance made to them is inadequate. The other parties,

unless the settlement is made, will claim the full amounts allowed by the master, as above suggested. We suppose you know that this matter will be in the hands of Judge Pardee for settlement, unless an arrangement is made. Of course it is desirable to make an arrangement, but you must yourself judge whether you are likely to fare better or worse by bringing the matter before the judge. Of course these matters must be arranged before possession can be obtained. Please get the opinion of the committee, and let us hear from you as soon as practicable.

"Very truly, HERBERT B. TURNER."

R., pp. 80 and 81.

Mr. Dillingham, in addition to his testimony, introduced in evidence a letter written to him on March 12, 1894, by Henry K. McHarg, one of the purchasing committee, in which letter, among other things, he says:

"I also notice that Mr. Winter has made a report up to December 31st, 1892, inclusive, of the balance on hand. I supposed that when the road was sold his compensation as special master ceased, and that in fact there was no one under pay except yourself, as receiver, until your discharge" (R., p. 111).

This letter is relied on as an admission by Mr. McHarg that Dillingham was to receive his compensation until his final discharge, but Mr. McHarg, in his testimony, explained this letter to the entire satisfaction of Master Lathrop and of the circuit court. Referring thereto, he says:

"I did not write the letter with the idea he was entitled to the $150 per month, or to any additional sum over the $20,000, for I considered that amount an outrage upon our committee to pay at the time, but we seemed forced to do so and had to submit. In fact, my letter was sent to him simply to try and limit our payments in the future, not with the idea or thought that he was entitled to anything, and, as you will notice, was written on March 12, 1894, when the Texas Central Railway Company had assumed control of the property September 25, 1891, or nearly two and a half years after we had been in possession" (R., pp. 69, 70).

The foregoing is a fair statement of all the testimony, pro and con, introduced before Special Master Lathrop on the point as to whether the $20,000 was paid in compromise settlement of the claim set up in Dillingham's petition for "such an allowance for his services as receiver in the above-entitled cause from the date of his appointment until his discharge." That there was a compromise the circuit court of appeals distinctly finds in its opinion in the following language:

"At the time of the sale of the railway property under a compromise arrangement Receiver Dillingham was paid $20,000."

That it was a compromise of the claim set up in his petition for final compensation is a fact so patent on its face we are unable to conceive how it could be determined otherwise, and that his petition *demanded compensation from the time of his appointment until his discharge* plainly speaks for itself. May an appellate court set aside a finding of fact by a master supported, as this appears to be, by the weight of the evidence? Would this court set aside that report? Is there really a rule whereby we may be governed in judging what will be done with a master's report? We think such rule is firmly established by this court and closely adhered to. This court will not disturb a master's report of facts unless it is clearly wrong. (See cases quoted in former part of this brief.)

The second of the above facts found by the master is:

"Since turning over the rolls, etc., to the purchasing trustees, the duties and labors of the receiver, as appears from the evidence, have not been arduous."

And, further, that:

"By receiving $150 per month from September, 1891, to April, 1893, has been much more than compensated for any labor he has performed as such receiver, from September, 1891, up to the present time."

These findings are clearly supported by the testimony, but they are not essential facts conducing to show whether or not the compromise agreement was entered into, but show clearly that Mr. Dillingham was not, by the circuit court, dealt with harshly, and that he has no equity in his claim to the money, and has been more than fully paid for all services. The testimony on this subject is likewise conflicting, but preponderates in favor of the master's findings. On this subject Judge Newman, in the opinion, says:

"It is difficult to determine from the record exactly what services beyond perfecting land sales and preserving the fund the receiver rendered after the sale of the railway."

The period from April, 1893, to April, 1895, is the time to which special attention should be directed, for the period from September, 1891, to April, 1893, is not involved in this contention, as Dillingham received the $150 per month during that time, and Master Lathrop reported against us for that period, because the reports of Master Winter approving the receiver's accounts for that period had not been excepted to in time. The money for that period was taken and appropriated by Dillingham without the knowledge of the purchasing trustees, and therefore before they had begun to object to his accounts, and the decree appealed from allows Dillingham to keep it, not because he was entitled to it originally, but because we lost our right to object by failing to act within the time prescribed by the equity rules.

Dillingham received for his services during that period about $2,850. It is only the $3,600, covering the last two years, that is in dispute here. Dillingham practically did nothing during this period except to hold in a bank, of which he was a large stockholder and vice-president, about $40,000 of these funds. Mr. Gibbs, land commissioner, testified as follows:

"Mr. Dillingham has had nothing whatever to do with said lands and lots since the sale above mentioned, in so far

as giving me instructions in any respect, or my making reports to him may be concerned; in fact, have had no instructions whatever from him since April, 1893" (R., pp. 86 to 87).

This testimony shows that Mr. Dillingham had nothing whatever to do with the lands and lots after April, 1893. His accounts for the same period show that little or nothing was being done by him. Outside of receiving the money sent him by the attorneys, who, he says, collected the few land notes that were collected, he did nothing during this period except hold the funds in his bank and disburse to himself each quarter the sum of $450. (See his reports during this period; R., pp. 124, 129, 132, 134 to 140.)

Master Lathrop, having heard all the evidence, not only concluded that the compromise agreement, as claimed by us, was established by the testimony, but that Dillingham, by receiving the $150 per month from September, 1891, to April, 1893, had been much more than compensated for all the services he had performed since the road was delivered to the purchasers down to the present time. In all seriousness, can it be said that these findings of fact are without evidence to support them? Did he commit an error in finding these facts? If so, where is the error, and where are the facts which condemn these findings? The master heard all the evidence; much of it was oral. Were not he and the circuit court much nearer the witnesses, and had they not better opportunities to judge of these facts than an appellate court could possibly have? And is not the recognition of this fact the real basis of the rule that the master's findings are entitled to so much weight?

The third of the above facts found by the master is "and such services were contemplated when the fee of $20,000.00 was paid in." This finding is clearly supported by the testimony. This is a finding that such small services as Dillingham is shown to have actually performed were con-

templated when the $20,000 was paid him. Our discussion of the first findings above makes this clear. It will be recalled that the compromise was of the claim set up in Dillingham's petition for allowance, wherein he *demanded pay from the time of his appointment to his discharge.* He agreed to accept in satisfaction of this claim $20,000. These petitioners agreed to pay said sum in satisfaction of said claim. It was to get rid of that claim that this large sum of money was paid. Their minds met and the money was paid. Dillingham was not claiming in his petition compensation down to the time he filed his petition or down to the time of the hearing before the master, *but until his discharge.* It was that claim that was compromised and settled by paying $20,000.

Mr. Dillingham's counsel at the hearing asked him the question: "Is it not a fact that the understanding was to the contrary, that you were to be compensated for matters with reference to the receivership thereafter, and that you were to continue to draw the $150.00 until the receivership closed finally," to which Mr. Dillingham answered, "I do not know that the question was discussed. I think at that time it was supposed the thing was to be closed up at once" (R., pp. 61, 62). In other words, Mr. Dillingham understood when he compromised the claim that the $20,000 was all he was to get, because it was supposed the thing was to be closed at once; and the evidence shows that to all intents it was closed at once so far as relieving him of any duties as receiver; and we are in perfect accord with Judge Newman when he says it is difficult to tell what Dillingham did after he turned over the road.

Mr. Dillingham, in his receipt to these petitioners, recites that it is "in full of my fees and charges as receiver of the Texas Central Railway Company as per agreement." All the evidence shows that the agreement whereby he became possessed of the $20,000 was a compromise of his claim for compensation until his discharge. Mr. Dillingham's atten-

tion was called to the receipt, and he did not attempt to explain it (R., p. 46). Can it be said that the finding of Master Lathrop that the services, if any, actually performed by Mr. Dillingham were not contemplated when the $20,000 was paid him? If so, where are the facts in the record which condemn them? Mr. McHarg testified that he understood it covered all his services. The master took his statement, which is in perfect accord with Dillingham's petition and receipt. A finding to the contrary would have been clearly against the weight of the evidence. Under the terms of the decree the purchasing bondholders were required to pay down enough cash to pay certain claims, including the final compensation of the receivers. They compromised with Dillingham by paying him $20,000.

In 6th Am. and Eng. Ency. of Law, 2d edition, page 711, it is said:

"As it is the policy of the law to discourage litigation and to enforce voluntary settlements effected without the interposition of the law, it has uniformly been held that the compromise of doubtful claims is valid, the mutual release of their respective rights by the parties to the controversy and the avoidance of the expense and annoyance of a suit at law being a sufficient consideration for the composition."

In support of the above proposition of law, the author cites the following cases:

Northern Liberty Market Company *vs.* Kelly, 113 U. S., 199; Central Trust Company *vs.* Wabash, etc., R. Co., 29 Fed. Rep., 554; Gaines *vs.* Molen, 30 Fed. Rep., 27; Robson *vs.* Mississippi River Logging Co., 43 Fed. Rep., 364; Battle *vs.* McArthur, 49 Fed Rep., 715; The Cayuga, 59 Fed. Rep., 483; 16 U. S. App., 557, and a number of decisions from State courts.

As the circuit court of appeals seems to have been under the misapprehension that we made no objections to the receiver's accounts until April, 1895, we desire to make that point clear. On this subject Master Lathrop finds:

"No objections were made to said reports and to the payment of said $150 per month until said master took under consideration the reports allowing to said receiver $150 per month for the months of April and May, at which time L. W. Campbell, attorney for the Texas Central Railway Company; Charles Moran, Henry K. McHarg and Cornelius B. Gold, purchasing trustees, excepted to the allowance of said payment to Dillingham; that after that date the same parties objected to the reports filed containing the charge of $150 per month paid to said Dillingham, and on April 8th, 1895, they filed objections to all the payments of $150 per month to said Dillingham from September, 1891. None of said master's reports since September, 1891, have been approved by the court, *but I consider that the reports filed prior to April, 1893, were, by the rules of the court, approved,* no objections being made thereto" (R., pp. 146–148).

The master having found that we filed proper objections before Master Winter and afterwards before the court to all of the receiver's accounts since April, 1893, and no exceptions having been made to said findings in the lower court by respondent, and there being no assignments of error calling in question the correctness of these findings, the finding ought to be held conclusive in this court.

The reports of Master Winter, covering the period from July 1, 1893, to March 31, 1895, which covers the entire period for which we recovered judgment against respondent, except the three months from April 1 to June 30, 1893, are found in the record on pages 125 to 140, inclusive. The report for the quarter ending September 30, 1893, was not filed until April 1, 1895 (R., p. 129). The report for the quarter ending December 31, 1893, was not filed until April 3, 1895 (R., p. 133). The report for the quarter ending March 31, 1894, was not filed until April 4, 1895 (R., p. 134). The report for the six months covering April, May, June, July, August, and September, 1894, was not filed until April 4, 1895 (R., p. 137); and the report for the six months including October, November, and December,

1894, January, February, and March, 1895, was not filed until June 22, 1895 (R., p. 146); and the final account was not filed until May 16, 1895 (R., p. 140).

All these reports show upon their face that these petitioners' objections were made before Master Winter to the items of $150 per month being charged by the receiver, and exceptions were filed in court to these reports and to all items showing this charge by these petitioners on April 8, 1895, which was long before some of the reports were filed and in less than thirty days after any of them were filed (R., pp. 27, 28).

The only doubt remaining is as to whether exceptions were filed before Master Winter to the receiver's account for the quarter ending June 30, 1893. Special Master Winter, in his report for the quarter ending June 30, 1893 (R., p. 127), makes it appear that no objections were urged against the receiver's account for that quarter before him, but he uses the following language in his report for the succeeding quarter:

"Mr. Campbell joined with me in an examination of the accounts aforesaid, and said that he had no objections or exceptions to make thereto, except to the two items of $150 each for salary paid to Receiver Dillingham for the months of April and May, 1893, etc." (R., p. 125).

And Master Lathrop expressly finds from the record before him, and so reports to the court, that we excepted to all charges of $150 per month in the report for that quarter, and the findings not having been excepted to, and there being no objections raised to it by any assignment of error, we deem that it is unnecessary to further discuss that question.

Equity rule 83 provides that—

"Parties shall have one month from the time of filing the report to file exceptions thereto; and that if no exceptions are filed within that period by either party the report

shall stand confirmed on the next rule day after the month is expired."

It was upon this rule Master Lathrop found that as we had not filed exceptions to the reports of Master Winter on the receiver's accounts prior to April, 1893, we were concluded and estopped from going behind those reports.

This statement is made with the above particularity so that in reviewing the opinion of the circuit court of appeals it will not be necessary to verify this statement by the record every time we refer to this matter.

It having been shown above that the findings of Master Lathrop upon which the decree of the circuit court is based are clearly supported by the evidence, and that we in time excepted to all accounts since April 1, 1893, we invite this court to review with us the opinion of the circuit court of appeals, so that it may judge whether any reason has been shown for setting aside said findings of fact.

Review of Opinion.

That court finds that under a compromise arrangement Receiver Dillingham was paid $20,000, and further on in the opinion quotes Master Lathrop's finding of fact "that the compromise was intended as revoking the order of December 4, 1886, allowing him $150 per month, and was intended as full compensation for the services up to the time the receivership terminated." That court also finds that the report was subsequently approved by the circuit court. Upon these findings of fact, and which of necessity went to the foundation of the case, the court of appeals reverses the circuit court on questions of fact only. It is nowhere held that the findings are either not supported by the evidence, or that the compromise agreement is illegal, invalid, or contrary to public policy. Still the court reverses the decree appealed from and orders the exceptions

to be dismissed. Allowing the master's findings to stand and tacitly conceding their correctness, the court of appeals evades their force and effect by a general argument of confession and avoidance and recites a number of facts, nearly all of them taken from reports filed by the former master, Winter, on the receiver's accounts for the years in question, but which reports had been duly excepted to by us, never approved by any court, were set aside and the accounts re-referred to Master Lathrop, and are supported by no evidence in the record and which are of necessity, under the circumstances, binding upon nobody. What is not taken from the findings of Master Winter are extracts from orders entered by Judge Pardee subsequent to the compromise agreement providing that the court shall still hold possession of the property not sold.

The court, in reciting the unconfirmed reports of former master, Winter, lays stress on the letter written by McHarg to Dillingham of date March 24, 1894. This letter was written long after we had begun to object to Dillingham's accounts. Besides, Mr. McHarg fully explained this letter and testified that it was not written "with the idea he was entitled to the $150 per month or to any additional sum over the $20,000." Dillingham nowhere claimed that he relied on this letter as a reason for continuing to act as receiver. The master and circuit court passed on this evidence and found that it was fully and satisfactorily explained. No estoppel arising from this letter is pleaded.

The extracts from the reports of Master Winter and from the orders subsequently made consume almost the entire opinion of the court.

The court, having stated the sase as above indicated, finds that "those who are mostly interested in the compensation of the receiver appear to have made no objection at all to his receiving the $150 per month at any time." It already appears very clearly that these petitioners represent the first-mortgage bondholders and that these bondholders have

a judgment against the Texas Central Railway Company amounting to over $4,000,000, $3,000,000 of which is unpaid and unsatisfied (R., pp. 7 to 17). The decree appealed from in this case shows that the $3,600 required to be refunded by Dillingham is to be paid into court and to constitute a part of the funds of the receivership (R., p. 151). The record shows that the Morgan's Louisiana and Texas Railroad and Steamship Company has a judgment against the Texas Central Railway Company for about one-fifth or one-sixth of this amount (R., pp. 7 to 17). These are the only parties at interest, except the defunct corporation, the Texas Central Railway Company, which can have no interest whatever in this controversy; therefore it cannot be said that those mostly interested stood by and made no objections at any time, for the purchasing trustees are the ones mostly interested of all parties.

The opinion proceeds:

"Conceding the purchasing committee to have been interested in this question of compensation, they stood by for years and allowed the receiver, Dillingham, to pay himself this amount, simply objecting during the last two years, and having their objections overruled without further action."

This is a misconception of the record. The testimony of Mr. McHarg, a member of the purchasing committee, shows that all the committee reside in New York; that they knew nothing of this matter until they discovered, about 1893, that Dillingham was taking out of the funds this $150 per month. They then begun to actively object and have kept up the fight until the present time. They have never abandoned their rights since they discovered they had any.

The court say further:

"No effort seems to have been made to have the receiver discharged."

Under the compromise agreement reported by Master Lathrop, the receiver should not have been discharged until

the circuit court thought proper to do so, and the fact that the receivership was allowed to continue is not only no evidence that Dillingham did not enter into the compromise agreement whereby he received the $20,000 in a lump, without delay or litigation in full of his fees and charges and in lieu of the $150 per month, but is entirely consistent therewith.

The court say further:

"No motion appears to have been made to have the court reduce the amount of his compensation. The orders fixing his compensation originally were allowed to stand."

The amount of Mr. Dillingham's compensation was fixed by himself with those who, under the final decree, were required to pay it. The testimony shows that he contended for $30,000, and finally accepted $20,000 in addition to the amounts he had already received, and we do not understand that where an order, judgment, or decree, in favor of any party, including a receiver, has been compromised, that it is necessary to have a formal order entered by the court showing the compromise in order to protect the rights of the parties. If the order be not made, but it be proven that the claim had been compromised, and the original order in fact revoked in consideration of a large sum of money, no court would hold that the parties were estopped because a formal order of the court had not been entered showing this fact. It therefore cannot be said that the order fixing his compensation originally was allowed to stand. Under the master's finding it never had any substantial existence after the claim of Dillingham was compromised and settled.

The court say further:

"The orders passed at the time of the sale of the road, and the confirmation of sale, directing a continuance of the receivership, stood unchanged."

The orders referred to by the court are those quoted in the former part of the court's opinion. One of these orders was entered about the time the compromise was entered into and the other some time thereafter. The effect of these orders is simply to show that the court retained jurisdiction over the small amount of property, such as a few scattering town lots and a few tracts of land that were not foreclosed and sold out under the decree of foreclosure. We do not understand that there was any reason why these orders should be revoked or in the least interfered with in order to preserve the contract rights of the parties and to hold Receiver Dillingham to his contract of compromise. Just what effect these orders really have upon this case is difficult for us to understand. The testimony of Mr. C. C. Gibbs shows that every acre of land and every town lot held by virtue of the above-mentioned orders was sold under execution by the United States marshal on November 7, 1893, and purchased by himself and Charles Hamilton.

He further testifies:

"Mr. Dillingham has had nothing whatever to do with said lands and lots since the sale above mentioned, in so far as giving me instructions in any respect, or me making any reports to him, may be concerned; in fact, have had no instructions from him whatever since April, 1893."

With this state of facts in view, we hardly think this court will hold it was necessary in order to preserve our contract rights that the orders of August 28 and November 4, 1891, should have been revoked or abrogated, as the circuit court of appeals seem to think.

The court proceed and say:

"And yet after the receiver had proceeded until 1895 with all the responsibilities, obligations, and duties of the receivership upon him, and after he had retained under the still existing orders of the court the amount allowed him by that order, a motion is made to require him to refund the money, and to pay it into the registry of the court."

As shown above, we did not wait until the receiver had proceeded until 1895, as supposed by the court. We began to object as soon as his report, beginning with April 1, 1893, was filed with Master Winter, and the contest has been continued ever since. Where the court gets its understanding that we began to object in 1895 is, we suppose, from the fact that we filed a general objection to all of his accounts when Master Winter finally filed them in court and his reports thereon about April, 1895, but his and Master Lathrop's reports show that we had been objecting to all of them since April, 1893.

The court say further that our motion was "accompanied with damaging, but wholly groundless charges affecting the honor and honesty of Mr. Dillingham." We charged that he received $1,000 per year from his bank and that this was received in consideration of the $40,000 deposited by him in the bank. This, like other charges frequently made in the courts, was not proven, but it does not follow, as the court seems to think, that because we have assailed his honor and honesty that Mr. Dillingham should be excused from standing up to his contract of compromise, whereby he agreed to accept and did receive the $20,000 in compromise of his claim for compensation from the date of his appointment until his discharge and when he gave a receipt showing that it was "in full of my fees and charges as receiver of the Texas Central Railway Company." It may be conceded that we did him an injustice, but that is a different question from the one the court was called to decide and the one we are now presenting. That question was finally decided against us by Master Lathrop, confirmed by the circuit court, and from which finding no appeal was prosecuted by any party, and the circuit court of appeals does not make it appear as to what relevancy that branch of the case can have to the proposition under discussion.

The court say:

"Why the receiver should have been permitted to go and receive this $1,800.00 per annum without any movement on

the part of those interested to change the existing status is difficult to understand, except upon the theory that his services were valuable and necessary."

The witness McHarg fully explained his reason for not excepting to these items until 1893, which was because he did not know anything about it, and that he begun to make objections as soon as he was apprised of the fact that Mr. Dillingham was claiming the $150 per month in addition to the $20,000, so it cannot be presumed in the face of this record that he was allowed to draw the $1,800 per annum on the theory that his services were valuable and necessary. Besides, the record shows that for the last two years he performed no services. There was no land or town lots on hand; they had all been sold out, and the judge who wrote the opinion seemed perplexed to discover from the record what services Mr. Dillingham did perform, even after the road was turned over, to say nothing of the last two years.

The court say further:

"When the purchasing committee excepted to the master's report, and their exceptions were overruled, they seem to have acquiesced all along until suddenly in 1895 this proceeding was instituted."

The court seems to be under the impression that we only begun to object in 1895, when we filed our exceptions in the court, but the reports of Master Winter and of Master Lathrop clearly show that we begun when the report beginning with April, 1893, was filed with Master Winter.

The court further say:

"The payment of the $20,000.00 as a compromise of the receiver's services was proved to have been based on the understanding that the receivership was then to be wound up and the receivership discharged, and did not in any way so far as we can see affect the order of the court making the monthly allowance to Dillingham."

The finding of Master Lathrop to the effect that "the compromise was intended as revoking the order of December 4, 1886, allowing him the $150.00 per month, and was intended as full compensation for the services up to the time the receivership terminated," is left unnoticed by the circuit court of appeals. It is nowhere held that that finding is without evidence to support it, yet in the face of that finding the court say that the compromise was based upon the understanding that the receivership was to be then wound up and the receivership discharged and did not in any way, so far as they could see, affect the order of the court making the monthly allowance to Dillingham.

The court, in making the above statement, has evidently gotten its understanding of the evidence from the testimony of Mr. Dillingham, but Mr. Dillingham did not testify, nor did any other witness, that the payment of the $20,000 "was based upon the understanding that the receivership was then to be wound up and the receivership discharged." Mr. Dillingham says: "I do not know that the question was discussed; at that time *I think it was supposed* that the thing was to be closed up at once" (R., p. 46). Please note the language. At the time he was testifying he seemed to think it was supposed the thing would be closed up at once—an exceedingly vague statement to be substitued in the place of the solemn finding of a master, supported by the confirming decree of the circuit court. Mr. Dillingham could not have supposed and did not testify that the thing was to be closed up at once, for he says: "When the railroad was turned over to the trustees, there was left in my hands a large amount of lands, town lots, notes that had been given for town lots and lands that had been sold; the lands and town lots for sale, and the notes for collection, and I had general charge of the collection of these notes, and disposition of lands and lots and looking after the property left in the hands of the receiver," and that he had about $40,000 in cash left on hand (R., pp. 36 and 37). As

stated above, he nowhere uses the language that there was an understanding about these matters; and the further statement of the court that the payment of the $20,000 did not affect the drawing of the $150 per month is shown by Mr. Dillingham's own testimony to have been not discussed. Indeed, it was altogether unnecessary to discuss that question, because Dillingham's petition for compensation, and those of all the other claimants being pressed at the time, and Mr. Dillingham's receipt for the $20,000 showed very plainly what was claimed by him and what was being compromised. Mr. McHarg testified contrary to the court's statement above. Dillingham's petition and his written receipt testified to the contrary, and the correspondence between the attorneys introduced and read in evidence testified to the contrary. So it cannot be said that this money was paid upon that understanding, and without affecting the order of the court making him the monthly allowance, unless it be true that the solemn finding of a master, approved by the circuit court, based upon the preponderance of the testimony, are utterly worthless and must be set aside, and the mere thoughts and suppositions of an intested witness, contradicted by his own written statements, be accepted in their place.

But it may be granted that he and all parties mutually agreed in supposing that the thing was to be closed up at once. Can that fact have the effect of discharging Mr. Dillingham from his solemn engagement to accept the large sum of $20,000 in full of his fees and charges, without delay, expense, or litigation, in lieu of the $150 per month?

If this supposition formed an essential inducement, and was one of the substantial conditions upon which the compromise agreement was entered into, and was broken without his fault, that fact, if true, might have been pleaded by Mr. Dillingham as an equitable ground for asking relief from his contract. But he puts forth no such defense. He

nowhere asks to be relieved from his contract. Unlike the circuit court of appeals, he pleads no confession and avoidance. His sole defense is a general and vigorous denial of our facts.

The court further say:

"And if it can be so construed, why was it not brought to the attention of the court at the time, certainly at the end of the first quarter after the sale when the receiver's accounts were filed?"

This has been fully explained by Mr. McHarg, who testified that he did not know Mr. Dillingham was claiming or drawing this $150 per month until he began to object. Estoppel is not pleaded. If it were pleaded and insisted upon, there is no element of estoppel in the facts of this case. Suppose it be conceded that the master's finding is correct, and that the $20,000 was paid in compromise of Dillingham's entire services, and that we knew Dillingham was drawing this $150 per month, and raised no objections whatever until April, 1893, is there any element of estoppel in that kind of a proceeding? Is Dillingham put in any worse position? Is he not put in a better position by the sum of $2,850 by our failing to object? If the compromise was made as the master reported, Dillingham was clearly not entitled to the $2,850, and he got that solely because we did not object in time. The $3,600 in dispute was taken in the face of our objections and while we were objecting.

The court proceed:

"The finding of the special master is that up to April, 1893, the compensation should be allowed, because the accounts having been filed, and there being no objections, they stood presumably approved by the court under the rule. If the approval of the court is presumed up to April, 1893, why is it not equally true that the approval of the court is presumed to the receiver's continued receipt of this amount?"

The above statement and inquiry do the court an absolute injustice. It is based upon the idea that the circuit court was continually approving these accounts, and the judge writing the opinion doubtless did not have in mind the equity rule that all reports of a master in chancery stand approved if not excepted to within thirty days. That was the ground upon which Master Lathrop found against us on our exceptions to the money taken prior to April, 1893. Dillingham's reports were during that period regularly filed with Master Winter. He passed upon these reports and allowed the claim of $150 per month, and filed these reports in the circuit court, and as we did not except to these allowances within the thirty days allowed under the equity rule, they stood approved, not by any presumptive action of the court, but absolutely as a rule of the court. There is no logic in the suggestion that because they were approved by a rule of the court on account of our failure to except within thirty days that the approval of the court is presumed to the receiver's continued receipt of this amount, after we began to object. This could not be presumed, because we excepted within the proper time, and have followed up these exceptions continually. Both of the master's reports and the entire record show this.

The court say further:

"If the compensation was to run at all after the sale of the road, and the payment of the $20,000.00, there was no reason for stopping it in April, 1893. If it continued rightfully, it continued by virtue of the original order allowing it in 1886, and it continued until the receiver was discharged, and so, instead of the approval of the court operating to justify the allowance up to April, 1893, and no longer, its effect would be to approve the allowance under the original order so long as Dillingham continued to act as receiver."

Under the master's finding it did not continue rightfully after the $20,000 was paid, and this money was taken wrongfully and in violation of Mr. Dillingham's contract of com-

promise with the committee until discovered in April, 1893, and it does not follow that it should continue until 1895, because we had slept on our rights under a rule of the court and had lost the $150 per month from September, 1891, to April, 1893.

The court proceed:

"It is difficult to determine from the record exactly what services, beyond perfecting land sales and preserving the fund, the receiver rendered after the sale of the railway."

We agree with the court that it is difficult to discover from the record what services Mr. Dillingham did perform during this time; but whatever they were, Master Lathrop finds were more than paid for, as shown above.

The court say further:

"But it is certainly true that if the purchasing committee, or any one interested, had moved in the matter before the court, the monthly compensation Dillingham was receiving, if too large, would have been reduced to the proper amount, or he would have been discharged and some other arrangement made for winding up the outstanding business."

The compensation that Mr. Dillingham was entitled to receive had already been paid him, and there was no necessity of appealing to the court until we discovered that Mr. Dillingham was violating his contract. When this discovery was made we objected in the proper manner, keeping up these objections, and finally filed our objections in the proper court and secured an order holding Mr. Dillingham to his contract, and this is as much as any one would be called upon to do. We had every reason to suppose Mr. Dillingham would stand up to his agreement. The fact that we did not object in time to save some of the money is no reason why we should be deprived of the right when we discovered he was violating his contract and save as much as possible of the money he was wrongfully taking. It is very true that if any one interested had moved in the matter

the circuit court would have reduced the compensation. That is precisely what was done. We objected just as soon as we got the information. The circuit court promptly acted, and the result of its action was to not only find the existence of the compromise agreement, but it found further that Dillingham had received much more than all his services were worth by taking the $2,850. This was in effect reducing his compensation to an average of about $67.90 per month, covering the entire period of forty-two months from September, 1891, to April, 1895. And yet while the circuit court did this upon a full hearing of the evidence the court of appeals reverses the decree when the opinion suggests that that would have been the proper course to pursue, and, in doing so, ignored another settled rule of this court "that the compensation to be allowed a receiver for his services, and those of his counsel, is largely discretionary with the court from which he derives his appointment, and its action will not be disturbed unless the discretion is abused" (Stuart *vs.* Boulware, 133 U. S. 78, (S. C.) 10 Sup. Ct. Rep., 242). It is nowhere claimed by the circuit court of appeals or by Dillingham or his counsel that the allowance of $2,850 was inadequate, or that the circuit court abused its discretion in holding that he was more than compensated for any services he performed after the road was turned over to the purchasers by receiving said sum of $2,850.

The court say:

"Nothing of this sort was done, however, and he was allowed to go on as receiver with all the responsibilities attached to that position."

The master's findings show that he was to go on and perform such small duties as were required at his hands for the $20,000.

And the court say further:

"And if entitled to compensation at all, after the sale of the railway, we see no reason why he is not entitled to it up to April, 1895."

The only way the court can arrive at the conclusion that Dillingham was entitled to compensation up to April, 1895, is by ignoring the findings of Master Lathrop to the effect that "the compromise was intended as revoking the order of December 4th, 1886, and was intended as full compensation for the services up to the time the receivership terminated." We concede that by substituting the thoughts and suppositions of Dillingham for all the other testimony in the record, and for the findings of Master Lathrop, and for the decree of the circuit court, the conclusion is logically reached that he is entitled to compensation up to April, 1895.

The court, having disposed of the case in the manner above indicated, say:

"We are of the opinion that the report of the special master, and the decree of the court below confirming the same, are erroneous. The decree of the circuit court is reversed and the cause is remanded with directions to overrule and discharge the motions attacking the receiver's accounts."

It has been with the utmost difficulty that we have been able to find upon what ground the decision rests. It must rest, if at all, upon the proposition that Mr. Dillingham's thoughts and suppositions are entitled to greater consideration than the testimony of all the other witnesses, all the facts and circumstances adduced in evidence, the conclusions of Master Lathrop, and the decree of the circuit court confirming his conclusions.

If this be true the opinion is correct. If the decree of the circuit court, the report of the master, and the overwhelming preponderance of testimony against Mr. Dillingham be

given the credence ordinarily given by this court to the findings of a master, and a preponderance of the testimony supporting them, the opinion of the circuit court of appeals is logically erroneous and should be quashed by this court and a decree entered here affirming the decree of the circuit court.

It appearing that Judge Pardee was recused and that the circuit court of appeals have ignored the settled rule of this court that a master's report of the facts will not be disturbed or modified unless it clearly appears to be erroneous and without evidence to support it, we ask that the decree of the circuit court of appeals be reversed and that the decree of the circuit court be affirmed.

Respectfully submitted.

L. W. CAMPBELL,

Solicitor for Amedee D. Moran, Cornelius B. Gold, and Henry K. McHarg, Petitioners.